

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**





*Orig. & Affiant  
of mailing*

**77-1399**  
**77-1400**

To be argued by  
RICHARD APPLEBY

---

**United States Court of Appeals**  
**FOR THE SECOND CIRCUIT**  
Docket No. 77-1339-1400

---

UNITED STATES OF AMERICA,

*Appellee,*

—against—

ANDREW DINKO and PATRICIA DINKO,

*Appellants.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

---

---

**BRIEF FOR THE APPELLEE**

---

DAVID G. TRAGER,  
*United States Attorney,*  
*Eastern District of New York.*

MARY MCGOWAN DAVIS,  
RICHARD APPLEBY,  
*Assistant United States Attorneys,*  
*(Of Counsel).*





## TABLE OF CONTENTS

|                                                                           | PAGE |
|---------------------------------------------------------------------------|------|
| Preliminary Statement .....                                               | 1    |
| Statement of Facts .....                                                  | 2    |
| 1. Introduction .....                                                     | 2    |
| 2. Testimony of Charles Johnson .....                                     | 3    |
| 3. The agents' testimony .....                                            | 10   |
| 4. The defense case .....                                                 | 12   |
| 5. The trial .....                                                        | 16   |
| ARGUMENT:                                                                 |      |
| POINT I—The Dinkos were represented by separate<br>counsel at trial ..... | 18   |
| POINT II—The prosecutor's summation was entirely<br>proper .....          | 20   |
| A. The government's summation with respect<br>to Charles Johnson .....    | 20   |
| B. The government's summation with respect<br>to Henry Segar .....        | 25   |
| C. The government's summation with respect<br>to Patricia Dinko .....     | 28   |
| CONCLUSION .....                                                          | 31   |

### TABLE OF CASES

|                                                                          |    |
|--------------------------------------------------------------------------|----|
| <i>Holland v. United States</i> , 348 U.S. 121 (1954) ....               | 30 |
| <i>United States v. Carrigan</i> , 543 F.2d 1053 (2d Cir.<br>1976) ..... | 20 |



|                                                                                                        | PAGE   |
|--------------------------------------------------------------------------------------------------------|--------|
| <i>United States v. DeBerry</i> , 487 F.2d 448 (2d Cir. 1973) .....                                    | 20     |
| <i>United States v. Falley</i> , 489 F.2d 33 (2d Cir. 1973) .....                                      | 29, 30 |
| <i>United States v. Rueda</i> , 549 F.2d 865 (2d Cir. 1977) .....                                      | 23     |
| <i>United States v. Tramunti</i> , 513 F.2d 1087 (2d Cir.),<br>cert. denied, 423 U.S. 832 (1975) ..... | 29     |

**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

**Docket No. 77-1339-1400**

---

UNITED STATES OF AMERICA,

*Appellee,*

*—against—*

ANDREW DINKO and PATRICIA DINKO,

*Appellants.*

---

**BRIEF FOR THE APPELLEE**

---

**Preliminary Statement**

Andrew and Patricia Dinko appeal from judgments entered in the United States District Court for the Eastern District of New York (Costantino, J.) on September 16, 1977, convicting them, after a jury trial, of conspiracy to distribute substantial quantities of heroin between September, 1971 and February, 1974 (Count I), in violation of 21 U.S.C. § 846, and of distributing approximately one-eighth of a kilogram of heroin on September 21, 1973, in violation of 21 U.S.C. § 841. Andrew Dinko was sentenced on both counts to five years' imprisonment and a special parole term of five years, the terms to run concurrently. He is presently free on bail pending appeal. Patricia Dinko was sentenced to concurrent terms of five years' imprisonment, execution of which was suspended. She was also placed on probation for five years, received a special parole term of five years, and was fined \$3,000.

The Dinkos raise the same two claims on appeal, neither of which challenges the sufficiency of the evidence. Defendants contend that they were denied their Sixth Amendment right to the effective assistance of counsel because they were represented by the same attorney at trial (Salvatore Quagliata). They also assert that the prosecutor's summation was improper in several respects.<sup>1</sup>

## Statement of Facts

### 1. Introduction

The principal witness for the Government was Charles Johnson. Johnson had been convicted in New York state court for selling an ounce of heroin on April 13, 1973 and an eighth of a kilogram of heroin on September 21, 1973 to undercover agents Henry Segar and Dorothy Johnson of the New York Drug Enforcement Task Force. Johnson was sentenced to serve from fifteen years to life in prison. Subsequent to his conviction, Johnson began cooperating with the United States Government. In return for his assistance, the Government promised to write a letter to the Governor of New York detailing the nature and extent of Johnson's cooperation. As a result of the Government's intervention, Johnson hopes to meet the Parole Board prior to the expiration of fifteen years (T. 42).

Johnson testified at trial that he received substantial quantities of heroin from both Andrew Dinko and Patricia Dinko—husband and wife—at their personal residence in Queens, New York on many occasions be-

---

<sup>1</sup> Co-defendant Joseph Boyd pleaded guilty to a "telephone count", 21 U.S.C. § 843(b), and received two years' imprisonment. He did not cooperate with the Government. Co-defendant Raymond Files is, and was at the time of trial, a fugitive.



tween September, 1971 and September, 1973. Johnson further testified that the heroin that he sold to the undercover agents in the case for which he was convicted was supplied by the Dinkos (T. 38-109).

The undercover agents confirmed that, during the course of their investigation of Johnson in 1973, they were able to accumulate a great deal of both circumstantial and direct evidence against the Dinkos. This evidence was introduced at the Dinkos' trial both as corroboration of Johnson's testimony and as independent proof of the Dinkos' guilt.

## **2. The testimony of Charles Johnson**

In September, 1971, Charles Johnson worked as a cook at Creedmore State Hospital (T. 47)<sup>2</sup> and supplemented his income by selling small amounts of heroin. At that time Johnson, co-defendant Files, and co-conspirator George Royster agreed to open a luncheonette (T. 50). In order to raise money, the three decided to sell large amounts of heroin. Royster stated that he knew an individual who would sell them undiluted heroin (T. 50).

The next day, Johnson, Files, and Royster drove to the residence of Andrew and Patricia Dinko at 187-20 Brinkerhoff Avenue in Hollis, Queens (T. 51). The three left their car and walked to the front door, which was opened by Patricia Dinko. Royster said he wanted to talk to "Kelly" ("Kelly" was an alias used by Andrew Dinko) (T. 54-55). Patricia told the three to wait. Returning to the front door, she stated to Royster that "Kelly" was asleep. Patricia told Royster that only he

---

<sup>2</sup> References in parentheses beginning with a "T" are to pages of the trial transcript.

could enter the house and that Johnson and Boyd must remain in the car. She also instructed Johnson to park the car at a distance from the house (T. 54).

While Johnson and Files waited in their car, Royster received an ounce of heroin from the Dinkos (T. 55-56), then emerged from the house, accompanied by Andrew Dinko. Andrew stated to Royster, in the presence of Johnson and Files, that if there were any problems with the ounce of heroin, Royster should return it to him and "we will straighten it out" (T. 55). Later that afternoon, Johnson, Files and Royster returned to Creedmore Hospital, where they tested the heroin and then diluted it for later distribution (T. 56-64). Subsequently, Files and Johnson had a falling-out with Royster (T. 63).

In October, 1971, Johnson and Files decided to make another purchase of heroin from the Dinkos (T. 64). The two went by automobile to the Dinkos' house and spoke with Patricia (T. 64). Patricia instructed the two to get back in their car and drive around the block to the A & P, where they would be met (T. 64).

Thirty minutes later, Andrew met Johnson and Files near the A & P. Johnson told Andrew that he and Files wished to purchase \$700 worth of heroin and explained that he and Files were no longer in business with Royster because of a quarrel they had had concerning the last heroin deal (T. 65). Andrew instructed Johnson that he should park his car in the same spot near the A & P and then walk to his (Andrew's) house.

The following day, Johnson did as he was told and walked to the Dinkos' house from the A & P (T. 66). Andrew answered the door and asked Johnson to enter. Andrew introduced Johnson to his wife, Patricia (T. 66). Johnson stated that he wished to purchase a half-ounce of heroin (T. 66).



Patricia then led Johnson to the basement. She placed a jar on a table and measured out a couple of "spoons" of heroin. Patricia asked Johnson whether he knew the procedure for cutting heroin, and Johnson replied he did not. Patricia then gave Johnson a demonstration. She explained that most of her customers purchased heroin that had been cut by her six times and said that she sold heroin at that purity for \$500 a half-ounce and \$1,000 an ounce (T. 67). Patricia gave Johnson a half-ounce of heroin, and Johnson paid the money to Andrew (T. 73). During the entire transaction, Andrew was in and out of the basement, checking the doors for police surveillance (T. 68).

During the period September, 1971 through November, 1971, Johnson purchased heroin at the Dinkos' residence approximately three to four times a week. On all of these occasions, it was Patricia who weighed out the heroin and Andrew who received the money (T. 73).

During a brief period in late 1971, when there was a shortage of heroin in New York City, Johnson did not purchase heroin from the Dinkos. Beginning in early 1972, the Dinkos sold approximately an ounce of heroin to Johnson on a regular basis. Again, on each of these occasions, Patricia measured out the heroin and Andrew received payment (T. 75).

In June, 1972, there was another shortage of heroin, and therefore the Dinkos did not sell heroin to Johnson until October, 1972. Beginning again in October, 1972, and continuing until September, 1973, Johnson purchased heroin from the Dinkos approximately four times a week. The Dinkos sold Johnson up to three ounces of heroin on each occasion (T. 78).

From April, 1973 through June, 1973, Johnson passed out leaflets for Andrew in his campaign for president of

the National Maritime Union (NMU) (T. 79).<sup>3</sup> However, Andrew continued to traffic in heroin during the campaign (T. 80). On April 13, 1973, Johnson returned to the Dinkos' house, after having spent the day working on the campaign (T. 80). On the street, in front of the Dinkos' house, Johnson met co-defendant Boyd. Boyd told Johnson that he had met two heroin dealers from Washington, D.C. who were interested in purchasing an eighth of a kilogram of heroin (T. 83). Unbeknownst to either Johnson or Boyd, the dealers from Washington were undercover agents of the New York Drug Enforcement Task Force, Detectives Henry Segar and Dorothy Johnson (T. 83). While Johnson and Boyd were talking together on the street, the Dinkos drove up to their house. Johnson walked over to the Dinkos' car and said that Boyd had met some people from Washington "who wanted to cop" (T. 85). Andrew told Johnson to invite Boyd inside for a talk (T. 86).

Johnson then returned to his own residence, which was only a few blocks from the Dinkos' home (T. 86). An hour later, Patricia's eleven year old daughter arrived to inform Johnson that he was wanted at the Dinkos' (T. 87). When Johnson entered the Dinko's house, Andrew, Patricia, and Boyd were discussing the heroin deal in the kitchen (T. 87). Andrew explained to Johnson that Patricia wanted Johnson to accompany Boyd when Boyd met the dealers from Washington (T. 87).

Patricia and Johnson then retired to the bedroom to discuss the deal (T. 87). Patricia asked Johnson what he thought of the two drug dealers from Washington, and Johnson said he was not sure (T. 88). Patricia repeated her husband's admonition that Johnson should ac-

---

<sup>3</sup> Andrew lost the election in June, 1973 by a landslide (T. 615).



company Boyd "to make sure he didn't get ripped off or anything" (T. 88).

Patricia and Johnson reentered the kitchen, where Patricia gave Boyd an ounce of heroin (T. 88). Johnson and Boyd then returned to the agents' car and Boyd introduced Johnson to Detectives Segar and Dorothy Johnson (T. 88). Segar gave Boyd \$1200 and Boyd handed Segar the ounce of heroin (Gov't Exh. 10).

After the purchase, Johnson paid Boyd \$200. He then returned to the Dinkos' residence, where he delivered \$1,000 to Andrew. When Johnson asked the Dinkos for his commission, Patricia gave him a "spoon" of heroin (T. 89-90).

Two weeks later, on April 26, 1973, Detectives Segar and Johnson met Boyd and Johnson at Johnson's residence on Farmers Boulevard (T. 90). Segar stated that he wanted to purchase an eighth of a kilogram of heroin for \$3,000 (T. 91). Johnson then left his apartment, leaving Boyd and the agents, and walked to the Dinkos' house. There he discussed Segar's offer with Andrew and Patricia (T. 92). Patricia stated to Boyd that she would sell Segar three ounces with a "four cut" for \$3,000. Johnson returned to his apartment and he relayed the counter offer to Segar, who said that he would wait until he could buy less diluted heroin (T. 93).

On September 20, 1973, Johnson again met Segar on Farmers Boulevard in Queens. Segar stated that he was still interested in purchasing an eighth of a kilogram of heroin (T. 96). Johnson told Segar that he would "check with my people", whereupon he walked to the Dinkos' residence. There Johnson told Andrew and Patricia that "Henry" wanted an eighth of a kilogram of heroin for \$4,500 (T. 96). The Dinkos said that an eighth of a kilogram would cost \$5,300 at scale weight (T. 97). They



gave Johnson a small sample of heroin to give to Segar. Johnson delivered the sample to Segar and informed him of the Dinkos' proposal. Segar agreed to meet Johnson the next day at a diner on Farmers Boulevard (T. 97).

The next day, September 21, 1973, Johnson met Detectives Segar and Johnson near the diner. Johnson and the agents then drove to a location a few blocks from the Dinkos' residence (T. 98). Segar gave Johnson \$2,000 as partial payment for the eighth of a kilogram at spoon weight. Johnson left the agents' car and returned to the Dinkos' house, where Andrew and Patricia were waiting (T. 99). Johnson gave Andrew the \$2,000, informing him that the balance would be paid upon delivery of the heroin.

Andrew then expressed concern about possible police surveillance (T. 99), and he and Johnson drove around the block looking for surveillance. By the time they had returned, Patricia had prepared the package of heroin (T. 100). Patricia instructed Johnson to first go to his apartment before he returned to the agents. Johnson left with the package, went to his residence, changed his clothes, and then returned to the agents' car (T. 101). Johnson delivered the package to Segar who, in turn, gave it to Detective Johnson (T. 102; Gov't Exh. 14).<sup>4</sup> Segar paid Charles Johnson the remaining \$2,500, and Johnson brought the money to Andrew. Patricia gave Johnson a half-ounce of heroin and \$200 as a commission (T. 102-103).

On November 14, 1973, Johnson met Segar at the home of Frances Burgess, Johnson's girlfriend, on Farm-

---

<sup>4</sup>It was stipulated that if a chemist had been called as a witness, he would have testified that Government Exhibit 10 (the ounce of heroin received by the agents on April 13, 1973) and Government Exhibit 14 (the eighth of a kilogram) were analyzed to be heroin hydrochloride (T. 236, 255).

ers Boulevard. Segar told Johnson that he wished to purchase a kilogram of heroin directly from Johnson's supplier (T. 104). Johnson left Segar at Burgess's residence and went to the Dinkos' house, where he discussed Segar's proposal with Andrew and Patricia. Patricia stated that before she met Segar, she first wanted to check him out (T. 106).

Andrew, Patricia and Johnson then got into the Dinkos' car and drove to Burgess's house. Johnson went into the house. After Johnson had been with Segar for a few minutes, Patricia entered the house. Patricia pretended to be visiting Frances Burgess and, after a short while, departed (T. 107). Johnson then told Segar that he would contact him about the kilogram, whereupon Segar also left.

Johnson returned to the Dinkos' home, where he met Andrew and Patricia. Johnson said that he was suspicious of Segar, but Patricia said that he appeared to her to be a legitimate narcotics dealer (T. 107).<sup>5</sup>

In December, 1973, Boyd informed Johnson that he had been arrested and that the police were looking for Johnson, the Dinkos, and Files. Boyd said that he now knew that Segar and Detective Johnson were undercover agents (T. 108). Johnson immediately went to the Dinkos and related to them his conversation with Boyd. Andrew said that Boyd must be in error because Patricia had met Segar at the railroad station and Segar had had a chance to buy as much heroin as he wanted from her, but never showed up with the money. Andrew opined

---

<sup>5</sup> Subsequently, on November 27, 1973, Patricia met Segar at the Long Island Railroad station while Andrew surveilled the meeting between his wife and Segar. See Statement of Facts, *infra*, pp. 10-11.



.. If Segar was indeed an undercover agent, he would have gone through with the purchase (T. 108).

### 3. The agents' testimony

Detectives Henry Segar<sup>6</sup> and Dorothy Johnson totally corroborated Johnson's testimony with respect to his meetings with the agents on April 13, April 26, September 20, September 21, and November 14, 1973 (T. 203-275, 353-370). Segar and Johnson attributed to Charles Johnson, Joseph Boyd, and Raymond Files numerous statements made during the course of undercover negotiations, in which the three implicated the Dinkos in the heroin conspiracy (T. 210, 222, 240).

Segar further testified that on November 27, 1973, he made arrangements over the telephone with Joseph Boyd

---

<sup>6</sup> Segar was dismissed from the D.E.A. prior to the *Dinko* trial. The facts surrounding Segar's dismissal are as follows:

In an undercover case, while a New York City Detective assigned to the New York Drug Enforcement Task Force, Segar purchased a quantity of heroin from an individual in a dimly lit bathroom in Harlem. Later one Powell was arrested for making the sale to Segar. Segar then viewed Powell from behind a one-way mirror. Segar claimed that he told his superiors that he was not sure if Powell was the person from whom he purchased the heroin. Five of Segar's superiors testified, and the hearing examiner at Segar's dismissal hearing credited their testimony, that Segar did state that he could identify Powell as the person from whom he purchased the heroin. Segar then went to the grand jury, and without informing the Assistant United States Attorney of the problem, testified that he purchased the heroin from Powell. In preparation for the *Powell* trial, Segar informed the prosecutor that he could not make an in-court identification, and Segar so testified at trial. Powell ultimately pleaded guilty during the middle of his trial to the possession of heroin (T. 290-299; 337-353).



to meet Boyd's supplier (Gov't Exh. 15).<sup>7</sup> Segar met Boyd at Boyd's residence and the two drove to the Long Island Railroad Station on Archer Avenue in Queens (T. 269). Once inside the station, Boyd gave Segar a telephone number to call. Segar called the number from a phone booth inside the station. A male answered and stated that he could sell Segar a kilogram of heroin. Segar said he wanted a sample first (T. 271). The conversation then ended abruptly.

Segar turned to Boyd, who had been standing outside the booth, and stated that his supplier's price was too high. After returning to his car, Segar observed Boyd talking to Patricia Dinko (T. 272). Boyd beckoned to Segar, whereupon Segar and Patricia began to talk about the kilogram heroin deal.

Segar told Patricia that the price was too high. Patricia asked Segar what he had been paying per kilogram, and he replied \$37,000. Patricia stated that her price was \$37,000, but that if he intended to be a regular customer the price could be lowered to \$32,000. The agent asked if he could purchase a half-kilogram of heroin as a sample, but Patricia said she would only sell in kilogram quantities. Patricia further stated that Segar would be purchasing the heroin directly from her and that if there were any problems, he could return to her (T. 274). Segar said that he would recontact Patricia through Boyd. However, the transaction was never completed because the D.E.A. would not release the \$32,000 for the deal (T. 274-275).

Police Officer Jack Dworsak was the last witness called by the Government. He testified to the surveillances he

---

<sup>7</sup> In a recorded telephone conversation, Boyd provided Segar with the telephone number of his supplier of heroin (T. 264-9; Gov't Exh. 15). The telephone number was that of the Dinkos at their residence (T. 404-05).

conducted on the Dinkos' residence while Detectives Segar and Johnson were purchasing heroin from Johnson. Dworsak observed Johnson and Boyd enter and exit the Dinkos' house during the course of the undercover purchases on April 13 and September 21, 1973. On November 27, 1973, in addition to observing Segar and Patricia Dinko in conversation, Dworsak noticed Andrew Dinko surveilling the area (T. 402-403).

#### 4. The defense case

Testifying in her own behalf, Patricia Dinko provided a highly contrived defense for both herself and her husband, Andrew, who did not testify.<sup>8</sup>

In 1973 Patricia worked as Andrew's campaign manager in his campaign for President of the NMU. Among her co-workers were Charles Johnson and Raymond Files (T. 430-439). According to Patricia, on November 15, 1973, a campaign worker, Nick Burgess, informed her that Johnson and Files intended to "rip off" a drug dealer and his wife for \$40,000. Burgess told Patricia that the two drug dealers were trying to locate, of all people, the Dinkos, in order to purchase drugs from them (T. 448-500). Since Files and Johnson knew full well that the

---

<sup>8</sup> Patricia stated that neither she nor her husband had ever had any involvement with drugs (T. 474-475). She said that she never heard her husband ever speak of drugs; that she never saw Andrew possess any drugs; and that she herself had never possessed drugs (T. 481).

Patricia also attempted to establish alibis for both herself and Andrew for two critical dates, April 13, 1973 and November 14, 1973. It will be recalled that Johnson testified he received an ounce of heroin from the Dinkos on April 13, 1973, which he later delivered to the agents; and that on November 14th, 1973, the Dinkos went to Francis Burgess's house to check out Segar.



Dinkos were "innocent parties to the whole affair" (T. 449) and were not drug dealers, they decided that this was a good opportunity to "rip-off" the dealers for the \$40,000.

The next day, November 16th, Andrew and Patricia went to WWRL, a radio station with which the Dinkos had had frequent contact and which was sympathetic to Andrew's campaign (T. 507), to report that she and Andrew were suing the NMU for defamation of character, because a spokesman for the Union had allegedly stated that Andrew had had himself purposely shot in the arm in order to drum up publicity for the campaign (T. 510-512).<sup>9</sup> At the same meeting, Patricia also mentioned to the reporters Nick Burgess's story about the possible "rip-off". Patricia told the reporters that she thought "the whole thing was union inspired for the reason that no one sends a woman out with \$40,000 in cash around the states."<sup>10</sup> I felt they were trying to set us up because we had some problems with the union" (T. 512).<sup>11</sup>

The Dinkos and the reporters then discussed what their next move should be. They decided that Patricia, and not Andrew, should meet the drug dealers in order to determine whether they were from the union, because the NMU would be less interested in murdering her than

---

<sup>9</sup> Patricia conceded that the shooting took place right outside Andrew's doctor's office (T. 510).

<sup>10</sup> On cross-examination, Patricia admitted transporting, by herself, \$20,000 in cash from Trinidad to New York and keeping the cash in her house for several months (T. 570-571). Patricia said she inherited the cash from an uncle who was a Hindu priest (T. 568-570).

<sup>11</sup> Of course, in November, 1973, Andrew was not much of a threat to the Union since the election was long over and Andrew had lost by a landslide (T. 615).



in murdering Andrew (T. 513-514).<sup>12</sup> It was further decided that once Patricia had set up a meeting with these people, the Dinkos would call the radio station, which would then arrange to videotape the meeting so that the union's attempted frame-up could be publicly exposed (T. 513; 515-516).

The Dinkos then confronted Charles Johnson about the "rip-off" and he promptly confessed complicity in the scheme. Andrew then told Johnson that he must vacate the apartment he had been living in, at one of the Dinko's houses, because he, Andrew, suspected that Johnson had been using drugs (T. 471). Boyd also admitted, when confronted, that he intended to participate in the "rip-off" with Johnson (T. 472-473).

Pursuant to the plan formulated with the reporters, Patricia instructed Boyd to telephone her as soon as the drug dealers from Washington made contact with him. On November 27, 1973, Boyd telephoned Patricia and informed her that the heroin dealers were in town (T. 475). Patricia told Boyd that she would meet him and the drug dealers at the Long Island Railroad Station. That same day, Patricia and Andrew drove to the station.<sup>13</sup>

Patricia admitted having a forty-five minute meeting with Segar, but testified that when Segar was using narcotics language, she was at a loss to understand what

---

<sup>12</sup> Never once during this whole period did Patricia or Andrew consider calling law enforcement authorities (T. 502-504; 519-522; 525; 536-537; 557-558).

<sup>13</sup> On cross-examination, Patricia admitted that she set the time and place for the meeting. Nevertheless, Patricia never attempted to telephone the radio reporters, the police, or any other neutral person prior to the meeting (T. 538-540).

he was talking about.<sup>14</sup> Patricia informed Segar that she did not want him bothering Andrew's campaign workers (T. 479).

The next day, Patricia called the radio station to report on the meeting. It was decided by all that in order to carry through the plan of videotaping the meeting between Patricia and Segar, Patricia would wait to receive another telephone call from Segar. However, Segar did not call back (T. 479).

Despite the fact that the Dinkos owned two houses, supported four children, and were able to finance an election campaign, Patricia Dinko was totally unable, on cross-examination, to explain satisfactorily her sources of income for the years 1970 through 1977 (T. 558-568). In fact, Patricia testified that she had no idea how much income she had for the years 1971 through 1975 (T. 580).

Finally, when pressed about her sources of income in 1971, Patricia stated that she had inherited \$20,000 from an uncle who was a Hindu priest in Trinidad (T. 568-570). She brought the \$20,000 in cash from Trinidad to New York, where she kept it in her house for several months (T. 570-571). Finally, around December, 1971, Andrew and she deposited the cash in approximately twelve different banks in four different states (T. 571-579).

Patricia said that she was absolutely certain that she had filed income tax returns for the years 1969 through 1976 (T. 581). However, she stated she was refiled

---

<sup>14</sup> Patricia stated on cross-examination that, although she thought it was possible the "dealers" were from the NMU, she also thought they might have been legitimate narcotics dealers. However, she took no steps to acquaint herself with the language that narcotics dealers customarily employ (T. 546-550).



those returns because the Government had lost them (T. 581). Patricia testified that she had no idea whether her husband had filed any returns for 1969 through 1976, since they do not file jointly (T. 581-582).

The Dinkos also called as witnesses at the trial three radio reporters who corroborated Patricia's testimony concerning the meetings at WWRL.

## 5. The trial

Because the Dinkos claim on appeal that they were prejudiced by having been jointly represented by one lawyer at trial, we set forth below pertinent colloquy that occurred on June 13, 1977, just prior to the selection of the jury:

THE CLERK: United States of America vs. Andrew Dinko and Patricia Dinko.

MR. APPLEBY: The Government is ready for trial.

THE COURT: I'll complete the civil case I have.

MR. APPLEBY: When will we pick a jury?

THE COURT: Let me finish the calendar first and then I'll tell you.

MR. MANNING: Thomas A. Manning M-A-N-N-I-N-G, 137 Irvington Street, New York City, appearing on behalf of Patricia Dinko.

MR. APPLEBY: Also for Andrew Dinko?

MR. MANNING: No.

MR. APPLEBY: Your Honor, I just was informed by counsel that he is now representing Patricia Dinko and that she has retained separate counsel.



THE COURT: All right. Are you ready?

MR. MANNING: Well, your Honor, Mr. Quagliata is not here at the moment. He's representing the defendant Andrew.

THE COURT: We're ready for trial.

MR. MANNING: If he's not here I don't think you would want to proceed.

MR. APPLEBY: I talked to Mr. Quagliata. He's aware of the trial and he's ready to try this case.

THE COURT: All right. We'll select a jury today.

MR. MANNING: All right, Judge.

MR. APPLEBY: Thank you, your Honor.

An hour recess was taken and the jury was selected.<sup>15</sup>

---

<sup>15</sup> At the arraignment on the indictment on August 26, 1976 and at a pre-trial conference held on November 4, 1976, Patricia Dinko was represented by Erich Reich, whose offices were located at 277 Broadway in Manhattan, and Andrew Dinko was represented by Mr. Quagliata, whose offices were in Kew Gardens, Queens. On August 26, 1976, Mr. Quagliata entered a written notice of appearance on behalf of Andrew Dinko (Item 4, Index on Appeal). At no time did Mr. Quagliata enter a written notice of appearance on behalf of Patricia Dinko. Indeed, there is no record of a written notice of appearance having ever been entered on behalf of Patricia Dinko.

## ARGUMENT

### POINT I

**The Dinkos were represented by separate counsel at trial.**

The Dinkos claim that they were denied the effective assistance of counsel at trial by virtue of their joint representation by one attorney, Salvatore Quagliata. The Dinkos apparently made this claim, however, without having fully examined the record in this case.

The transcript of the first day of trial, June 13, 1977, makes clear that Thomas Manning, Esq., entered an appearance on behalf of Patricia Dinko and that Salvatore Quagliata, Esq., entered a separate appearance on behalf of Andrew Dinko.<sup>16</sup> As the transcript shows, Mr. Manning was part of the defense team and was continuously present in the courtroom throughout the entire trial (Tr. of June 13, 1977, p. 2; T. 2; 146; 320; 425; 588; 665).

The fact that Mr. Manning did not actually conduct the defense case was apparently a strategic and tactical defense decision and does not mean that he did not represent Patricia Dinko at trial. Indeed, under the circumstances, it is reasonable to assume that Mr. Quagliata

---

<sup>16</sup> On December 29, 1977, the Government mailed a copy of this transcript to appellants' counsel and invited counsel to submit a supplementary brief to discuss the question whether the Dinkos were, in fact, represented by separate attorneys. As of January 11, 1978, we have received no response from the Dinkos.

The transcript further indicates that Mr. Manning stated that his offices were located at 137 Irvington Street in Manhattan (p. 3). In his written notice of appearance, entered on behalf of Andrew Dinko *only*, Mr. Quagliata indicated his offices were located in Kew Gardens, Queens.



and Mr. Manning, after consultation with the Dinkos, decided that each of their respective client's interests would best be served by presenting a united front to the jury and thus they elected to have only one lawyer actively conduct the defense case. Now that that strategy has failed to produce the desired acquittal, the Dinkos have retained different appellate counsel to press the frivolous claim that they were "prejudiced" by their original decision to have only one lawyer present their case.

The Dinkos apparently believe that the criminal justice system is a game; if one's original strategy at trial does not result in an acquittal, all one need do is claim "ineffective representation", win a reversal, and then devise a new strategy for a second trial. We submit that this claim is totally without merit.<sup>17</sup>

---

<sup>17</sup> As noted above, the Dinkos have not responded to our suggestion that it might be appropriate to file a supplementary brief to discuss the impact that the June 13 transcript has on their claim. It may be that the Dinkos will contend at oral argument that although there were two attorneys at the trial, in effect they were only represented by one of them. If such is the argument, we note that, far from being prejudiced by the joint defense, the Dinkos gained a decided benefit by having one lawyer present their case. First, there was no defense available which would have permitted either Dinko to minimize his or her involvement at the expense of the other, because the record shows that there was not a single narcotics transaction or meeting in which both Dinkos did not participate. Second, since the record clearly reflects, as indicated above, that Mr. Manning represented Patricia Dinko, it goes without saying that in order for her to have testified, both counsel must have agreed that this was the best strategy. Third, the fact that Andrew Dinko, who was represented by Mr. Quagliata, chose not to testify further supports the conclusion that the defense strategy was agreed upon by both counsel and that that strategy was to present a unified defense. Fourth, Patricia Dinko's testimony provided a defense not only for herself, but also for her husband. Thus, there is no merit to Andrew Dinko's claim that he was prejudiced as a result of a reasoned decision by experienced defense counsel that he not take the witness stand. Fifth, the Dinkos

[Footnote continued on following page]



**POINT II**

**The prosecutor's summation was entirely proper.**

The Dinkos claim that several remarks made by the Assistant United States Attorney in his summation were so prejudicial as to require a reversal. Defendants assert that the prosecutor expressed his personal belief in the credibility of Government witnesses and made statements not based upon the record. We submit that the Assistant's summation was entirely proper.

**A. The Government's summation with respect to Charles Johnson**

The Dinkos quote a number of passages from the Government's summation which they contend conclusively demonstrate that the Assistant vouched for the credibility of Government witness Charles Johnson. These passages, on their face and taken either singly or in combination, do not come close to supporting this claim.

The first passage objected to reads:

What does the defense say about Charles Johnson? Basically, what the defense says is that Charlie Johnson got up on the stand and told you bald faced, outright, unmitigated lies. That, in effect, he was attempting to seduce you into making one of the most unjust verdicts that could possibly be made. (T. 671).

---

apparently still believe that their interests are co-extensive because they have chosen on this appeal to be represented by only one lawyer and to espouse a common position in their brief. The record thus makes clear that the Dinkos were not prejudiced in any way by having one lawyer conduct their joint defense at trial. See *United States v. Carrigan*, 543 F.2d 1053 (2d. Cir. 1976); *United States v. DeBerry*, 487 F.2d 448 (2d Cir. 1973).

The Dinkos contend that in the above passage the prosecutor implied to the jury that he has participated in many criminal cases and, that, based upon his experience, he concluded Johnson was telling the truth (Br. p. 37). We submit that it is inconceivable that the jury could have drawn such an implication from these remarks. The comment accurately characterized the defense position: that Charlie Johnson had lied about the Dinkos' involvement in the heroin conspiracy. Indeed, no objection was taken at trial to this comment.

The next passage objected to by the Dinkos reads:

Really what you are called upon to do is to decide whether the witnesses for the Government, Charlie Johnson, for example, has been telling the truth, or whether the defendants have been telling the truth. (T. 671-672).

Appellants claim that this comment improperly clothed Johnson "in the protective cloak of a Government witness." On its face, this argument is frivolous. The above-quoted passage is a totally neutral statement of the key issue in the case. No objection was taken to this comment as well.

The Dinkos next urge that the prosecutor "directly" vouched for Johnson's credibility in discussing his agreement with the Government:

The deal that we had with Charlie Johnson is what cracked the case. It enabled us to get to the bottom of it. (T. 679).

Counsel did not protest this remark at trial; moreover, this statement is quoted out of context. The preceding two paragraphs (T. 678-679) indicate that the Assistant was merely explaining to the jury that the only way the Government is able to obtain the testimony of an accomplice such as Johnson is to give him a motivation to



testify and that the agreement or "deal" provided that motivation.<sup>18</sup> Thus, in the above-quoted statement, the prosecutor was simply explaining to the jury that the "deal" motivated Johnson to cooperate, and directly led to the unfolding of the conspiracy.

Moreover, the Assistant's discussion of Johnson's credibility was in response to a vigorous attack of Johnson on cross-examination, a large portion of which focused upon Johnson's "deal" with the Government (T. 110-124), and anticipated a similar attack in counsel's summation, which indeed was forthcoming.<sup>19</sup>

---

<sup>18</sup> The prosecutor stated:

Now, he made a deal with the Government. I don't know whether you like the deal or you don't like the deal, but I say, ladies and gentlemen, it's totally irrelevant to this case. It's not an issue in this case, whether you like the fact that we made a deal or you don't. Because, ladies and gentlemen, a person like Charlie Johnson's whole life has been a life of crime. Everything he did in his life was according to his own self interest.

Charlie Johnson has to have a reason in terms of his own self interest to do anything. He is not about to get on the stand because he is a good guy and he believes that he wants to rid the world of narcotics dealers because he thinks that's the moral thing to do. He has got to have a reason. He's got to have a motivation, and the deal that he had with the Government gave him the motivation to do it.

<sup>19</sup> In his summation, Mr. Quagliata stated:

Give me 25 people that are facing 15 years to life, I'll give you 24 that will testify against somebody, that will be willing to testify against somebody if they were given the deal in this case and willing to implicate anybody because a drug dealer is scum; scum, the lowst form of life on the earth. They will give up their mothers, their fathers, their sisters, their brothers, and five generations back and six generations forward. They are scum.

Is it incredible to you? Here is a guy that made a deal without a lawyer. I couldn't do this well for any client in a million years. He makes a deal without a

[Footnote continued on following page]



The next excerpt of the Assistant's summation objected to here, but not protested below, is that the Assistant, in discussing Charles Johnson's credibility, improperly cast Patricia Dinko in the role of an adultress and a thief (T. 680-681). The challenged passage, reproduced at page 41 of appellant's brief, plainly states the exact opposite. The prosecutor merely suggested to the jurors what kind of evidence would provide a credible motive for Johnson to lie (i.e. having been jilted or having money stolen from him). However, he made absolutely clear that no such evidence had been presented at trial. The prosecutor was again speaking hypothetically when he made the comments objected to and reproduced at pages 41-42 of appellant's brief. The Assistant did not inject his personal beliefs, as defendants allege, but only argued that the testimony of an accomplice who admits his complicity in a crime is more reliable than that of an informer who does not. See *United States v. Rueda*, 549 F.2d 865, 869 (2d Cir. 1977).

The Dinkos further claim that since Patricia attempted to ascribe a motive on the part of Charles Johnson to falsely implicate her and her husband, the Assistant misstated the record as follows:

I suggest, ladies and gentlemen, you can scour that record, and there is not this much evidence, not a scintilla of evidence, as to what motive Charley Johnson would have for implicating innocent people as opposed to the real people that he dealt with. (T. 679-680).

---

lawyer, to commute his sentence, the U.S. Government writes to the State of New York—absolutely incredible.

You can go to Sing Sing or one of the penitentiaries upstate, 15 to life prisoners. They will testify against President Nixon, President Johnson, President Lincoln, President Grant, President—anybody that they think will help them: 15 to life. You don't hit the parole board for 15 years (T. 720-721).

Although appellate counsel claims the record was misstated, trial counsel obviously felt otherwise because, again, no objection was made to this comment. Clearly, the above-quoted excerpt was entirely fair argument concerning a contested issue of fact: the credibility of Johnson. The jury was well aware, as a result of the court's numerous instructions, that they were to determine whether the arguments of counsel were supported by the record and that they were the sole judges of the facts (T. 13, 681, 683, 684, 700, 702, 729).

Finally, in discussing Charles Johnson's credibility, the prosecutor made the following allegedly prejudicial statement:

I further suggest, ladies and gentlemen, that Charlie Johnson, even if he wanted to, could not keep a complicated series of facts such as he testified to, straight, if he wanted to lie. I don't think he was capable of it. (T. 685).

While the phrase "I suggest", or "I submit that" may have been preferable to "I don't think", the prosecutor did not imply to the jury that they should believe Johnson because he, the prosecutor, personally believed Johnson. Rather, he was merely arguing that Johnson was incapable of fabricating a complicated series of events because of his limited intelligence. It should be noted that on a number of occasions the court instructed the jury that the arguments of counsel are not evidence and that the arguments must be supported by the record (T. 681, 682, 683, 684, 700, 702, 703). The court also gave the following curative instruction during the middle of the prosecutor's summation: "What a lawyer believes is completely immaterial. It's what you people give to the facts in the case" (T. 684).

In sum, the Assistant, in discussing Charles Johnson's testimony, did not express his personal belief in Johnson's



credibility, and he made appropriate arguments which were totally supported by the record.

**B. Government's summation with respect to Henry Segar**

The Dinkos maintain that several comments of the prosecutor in summation concerning dismissed Detective Henry Segar were also improper. They claim that the Assistant improperly bolstered the credibility of Segar in stating the following:

What's the defense position here? That Henry Segar couldn't tell the truth about any fact whatsoever; that everything—two hundred—all two hundred cases of his are total lies; that he couldn't tell the truth no matter what.

Is Henry Segar paid by the head? Does he get an extra thousand dollars for convicting an Andrew and Patricia Dinko, just like Patricia Dinko and Andrew Dinko got extra money for selling an eighth of a kilogram of heroin. (T. 699-700).

This was an entirely proper argument that Segar had no motive to falsely implicate the Dinkos.

The Dinkos assert that the prosecutor, in discussing Segar's credibility, should not have been permitted to refer to the reports that Segar prepared in connection with his undercover meetings, since the reports were not in evidence. However, there was a great deal of evidence in the record with respect to these reports and the dates on which they were prepared (T. 223, 244-245, 250-251, 307, 340-342). Thus, the prosecutor's comments were not speculative but were supported by the record. Again, no objection was taken to this portion of the summation.



The Dinkos also claim that the prosecutor made assertions about Segar, not based upon the record, in the following portion of his summation:

All I am trying to say, ladies and gentlemen, is that now when Henry Segar is no longer with the Government, when it means nothing to him, Andrew and Patricia Dinko mean nothing to him, he identified Patricia Dinko. When his job depended on it, he refused—excuse me—he could not identify a person in Court and said that he couldn't identify that person in Court. He had every motivation to keep his job then and to lie and to say that he could identify that defendant in Court. (T. 704).

The fact of the matter is that defense counsel, in his cross-examination of Segar, fully developed the facts surrounding Segar's dismissal (T. 290-298; 337-346).<sup>20</sup> Moreover, the record makes clear that the Assistant was not implying that Segar was wrongfully dismissed.<sup>21</sup> The

---

<sup>20</sup> In his summation, defense counsel also claimed that Segar was not worthy of belief because of the dismissal:

Got a reason to lie? Of course he's got a reason to lie. Another guy gets on the stand, a dismissed agent and they now say the Government dismissed him in one place they were wrong, because here they are right. He should have been—where are we going with this case. The Government dismissed him because they had reason to dismiss him, and he should be dismissed, period.

We are not dealing with games and charades. People that failed to tell Grand Juries that they can't make an identification and they do make an identification? Where is this nonsense?

He says six other people are liars? Absolutely absurd. There is a tradition in this Courthouse, and the tradition is, you don't convict people on the likes of dismissed agents and Charlie Johnson (T. 723).

<sup>21</sup> See Footnote 6, *infra*.

prosecutor was merely contrasting Segar's situation at the time of the *Powell* trial, when he had a motive to coverup, to Segar's situation at the time of the *Dinko* trial, when Segar was no longer a detective and had no motive to lie about the Dinkos. Indeed, the Assistant indicated in his opening statement that Segar was dismissed from the Drug Enforcement Administration for good cause because his superiors "determined that his conduct was incompatible with that of a Drug Enforcement Administration agent" (T. 22).

In a miscellaneous claim, the Dinkos take issue with a portion of the prosecutor's rebuttal summation:

Mr. Quagliata seems to take issue with the number of years that have elapsed since the events in question. It's no mystery about that ladies and gentlemen. You heard about it from Charlie Johnson. Charlie Johnson started to cooperate on April 1, 1976. This indictment was returned promptly in June of 1976. The true facts in this case, the inner workings of this conspiracy did not emerge until Charlie Johnson started to cooperate on April 1, 1976.

That's when there was a prosecutable case. That's when we had a strong case. That's when we brought the case against Andrew Dinko and Patricia. (T. 726).

This was entirely proper in order to meet counsel's misleading implication to the jury in his summation (T. 722) that there was something improper about the Government waiting until 1976 to indict the Dinkos for events that occurred as far back as 1971, despite the fact that the Government had both direct and circum-



stantial evidence against the Dinkos in 1973.<sup>22</sup> Finally, the court sustained an objection to the use of the word "strong" in the above passage (T. 726).

In sum, the Dinkos' attack upon these portions of the Assistant's summation is without merit.

### **C. The Government's summation with respect to Patricia Dinko**

The second prong of the Dinkos' argument concerns the prosecutor's comments upon Patricia Dinko's testimony. The Dinkos object to the following passage:

Item: Patricia Dinko says that she keeps all her money in twelve different banks and in four different states. Why does she say that? She says, because I don't trust the banks. They are not solvent.

Didn't Mrs. Dinko hear of the FDIC? Did she think the Federal Government is going to fall down also? (T. 707).

Defendants claim that this argument was improper because the Assistant did not ask Patricia whether she was aware of the existence of the Federal Deposit Insurance Corporation. This is absurd. It is a fair assumption that a person sophisticated enough to hide large sums of money in twelve different accounts in four different states would have heard of the F.D.I.C. And the prosecution was thus well within bounds to claim such action was totally consistent with that of a narcotics dealer.

---

<sup>22</sup> In his opening statement counsel stated: "Now it's incredible—this is 1977—we're called upon to answer an indictment which allegedly goes back to acts committed in 1971". . . . "Things that happened in '71 and '73. Why are these people on trial in '77?" (T. 26).



The Dinkos also claim that there was no evidence they attempted to hide the \$20,000 in cash. However, although she ascribed to herself a different motive than that of hiding narcotics proceeds, Patricia did admit that she was attempting to conceal the money (T. 573). And the assertion that Patricia "volunteered" the fact that she brought \$20,000 into the United States in 1971 (Br. p. 47) is totally disingenuous. The record is clear that at the point she "volunteered" the information, Patricia was hard-pressed to explain any legitimate source of income for the years in question, and the story about the inheritance was a last-ditch attempt to claim some legitimate income. Finally, it was fair comment for the Assistant to speculate that Patricia had not filed income tax returns for the years 1969 through 1976, based on Patricia's testimony that the Government had lost those returns, and to draw the inference that the reason for the nonfilings was that Patricia could not report the proceeds of narcotics transactions.

Defendants also claim there is a "serious question" whether the \$20,000 represented narcotics proceeds. We submit that Judge Costantino acted well within his discretion in admitting this evidence. As this Court stated in *United States v. Tramunti*, 513 F.2d 1087, 1105 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975): "(T)he possession of large amounts of unexplained cash in connection with evidence of narcotics trafficking on a large scale is similar to the possession of special means, such as tools and apparatus, which is admissible to show the doing of an act requiring those means." Evidence of the same amount of unexplained monies—\$20,000—was introduced in another narcotics case, *United States v. Falley*, 489 F.2d 33, 38 (2d Cir. 1973), where this Court held that there was nothing improper in the prosecutor arguing to the jury that the funds were the proceeds of narcotics trafficking. Moreover, the foundation for the inference

that Patricia Dinko's \$20,000 was the proceeds of narcotics transactions was strengthened by a) the bizarre story as to how she said she acquired the cash; b) the efforts of the Dinkos to hide the money in twelve different banks in four different states; and c) the fact that the Dinkos had not filed tax returns.

Finally, the Government did not have any obligation to check Patricia's explanation as to the source of the cash (the deceased Hindu priest) because there is no evidence that the Dinkos offered such an explanation to the Government prior to trial and because the story about the Hindu priest was "a matter peculiarly within the knowledge of the defendant." *Holland v. United States*, 348 U.S. 121, 138 (1954); *United States v. Falley*, *supra* at 39.

In conclusion, we submit that the Assistant did not express his personal belief in the testimony of Government witnesses, nor did he make assertions not fully supported by the record. None of the excerpts from the summation objected to here even come close to error, much less "plain" error, for indeed, in most instances there was no objection at trial to the remarks now complained of. See Fed. R. Crim. P. 52(b). Accordingly, because the inferences and implications that the Dinkos now read into the challenged comments are strained and imaginary and because the record reveals that defendants were not prejudiced in any manner by the Assistant's summation, their convictions should not be disturbed by this Court on appeal.



**CONCLUSION**

**The judgments of conviction should be affirmed.**

Dated: Brooklyn, New York  
January 13, 1978

Respectfully submitted,

DAVID G. TRAGER,  
*United States Attorney,*  
*Eastern District of New York.*

MARY MCGOWAN DAVIS,  
RICHARD APPLEBY,  
*Assistant United States Attorneys,*  
*(Of Counsel).*









# AFFIDAVIT OF MAILING

STATE OF NEW YORK  
COUNTY OF KINGS  
EASTERN DISTRICT OF NEW YORK } ss

DOLORES M. BYRD

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 16th day of January 1978 he served a copy of the within  
BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:  
KUH, SHAPIRO, GOLDMAN, COOPERMAN & LEVITT P.C.

800 THIRD AVENUE

NEW YORK, NEW YORK 10022

and deponent further says that he sealed the said envelope and placed the same in the mail chute  
drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County  
of Kings, City of New York.

*Dolores M. Byrd*

Sworn to before me this

16th day of January 1978

JUANITA MAYO  
Notary Public, State of New York  
No. 31-4501911  
Qualified in New York County  
Commission Expires March 30, 1979



